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Reconsidering *Miranda*

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Few decisions of the Warren Court have attracted as much attention and controversy as its 1966 ruling in *Miranda v. Arizona*.[1] *Miranda* relied upon the fifth amendment privilege against compulsory self-incrimination to impose limits on custodial police interrogation. The Court was vilified for "handcuffing the police" and for "favoring the criminal forces over the peace forces." Recently *Miranda* has become the focus of renewed debate. The Department of Justice, in a 120-page report endorsed by Attorney General Edwin Meese III, attacks the *Miranda* decision as an illegitimate act of judicial policy-making that the Court should now overrule.[2]

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[1] 384 U.S. 436 (1966).

[2] U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pre-trial Interrogation (Feb. 12, 1986, with addendum of Jan. 20, 1987) ("DOJ Report"). The report states that its analysis does not represent the official position of any division other than the Office of Legal Policy, but the release of the report was accompanied by the announcement that Attorney General Meese had endorsed it. See Philip Shenon,

It is not inherently improper, of course, for a public official to urge legal positions different from those accepted by the Supreme Court. But in order to do so he should have some good reasons. In this case the report's objections to the legal basis for *Miranda* are misdirected, and its claims about *Miranda*'s harmful effects on law enforcement prove surprisingly thin.

Talk about "overruling" *Miranda* usually obscures the fact that *Miranda* contains not one holding but a complex series of holdings. They can be subdivided in various ways, but three conceptually distinct steps were involved in the Court's decision. First, the Court held that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute "compulsion" within the meaning of the fifth amendment. Second, it held that this element of informal compulsion is present in *any* questioning of a suspect in custody, no matter how short the period of questioning may be. Third, the Court held that precisely specified warnings are required to dispel the compelling pressure of custodial interrogation. The third step, the series of particularized warnings, raises the concerns about judicial legislation that usually preoccupy *Miranda*'s critics. But the core of *Miranda* is located in the first two steps. To assess the soundness of the Justice Department's case, we need to begin by considering these first two holdings in depth.

I. Informal Compulsion

The Court's first holding was that compulsion, within the meaning of the fifth amendment, can include informal pressure to speak. Note first that there is not the slightest doubt about the legitimacy of settling this question by adjudication. The fifth amendment says that no person shall be "compelled" to be a witness against himself. According to one view, this word referred only to formal legal compulsion. But it is a normal act of interpretation for a court to consider whether "compulsion" was intended to cover informal pressures as well.

A more important problem is to determine whether the Court's decision on this point was correct on the merits. In *Bram v. United States*,[3] decided in 1897, the Court had relied on the fifth amendment to suppress a statement made during a brief custodial

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Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights, N.Y. Times 1 (Jan. 22, 1987).

[3] 168 U.S. 532 (1897).

interrogation, but *Bram* was promptly forgotten, and for the next sixty years the Court consistently held that the fifth amendment privilege was inapplicable to police interrogation. Because the suspect had no *legal* obligation to speak, the argument ran, there was no compulsion in the fifth amendment sense. Under the due process clause, which was conceived as a different and more flexible standard, confessions were held inadmissible only when involuntary, and this "voluntariness" requirement was violated only when police employed tactics that were sufficiently extreme to "break the will" of the suspect.

In 1936, in its first confessions ruling in a state case, the Court held inadmissible a statement obtained by beating the suspect with a leather strap.[4] Subsequent decisions restricted interrogation techniques, but gradually and only partially. Physical violence was ruled out, but psychological pressure was not. Although decisions throughout the 1950s and early 1960s seemed to reduce the degree of permissible pressure, the admissibility of a confession still turned only on whether, under all the circumstances, the suspect's will had been "overborne." Marathon, all-night interrogation sessions, persistent cross-questioning, and use of numerous interrogators in relays were permissible under some circumstances.

Any witness who has faced thirty minutes of cross-examination by an aggressive defense attorney can easily imagine the pressures that were brought to bear and the potential for confusion and mistake that arose when a suspect without counsel was questioned for hours on end in the secrecy of the police station.

Members of the Court began to recognize that interrogation of an isolated suspect in custody was difficult to reconcile with the fifth amendment. At trial, at legislative hearings, and at any other formal proceeding, the criminal suspect had a constitutional right to remain silent. Even under the watchful eye of a judge, with his own attorney at his side, the suspect could not be pressured to speak. Many members of the Court found it difficult to justify a constitutional interpretation that permitted pressuring the uncounseled suspect to submit to questioning in the isolated environment of the stationhouse.[5]

In holding the fifth amendment applicable to informal compulsion, *Miranda* rejected a long line of precedent. Nonetheless,

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[4] Brown v. Mississippi, 297 U.S. 278 (1936).

[5] The classic discussion of this problem is found in Yale Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, reprinted in Yale Kamisar, Police Interrogation and Confessions 27-40 (1980).

this step in the *Miranda* analysis was not at odds with the original understanding of the fifth amendment. The early history of the privilege is clouded and ambiguous, but it seems clear that the privilege was intended to bar pretrial examination by magistrates, the only form of pretrial interrogation known at the time.[6] The reasons for concern about that form of interrogation under formal process apply with even greater force to questioning under compelling informal pressures. As Professor Edmund Morgan showed almost forty years ago:

> The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger. . . . Investigation by the police is not judicial, but when it consists of an examination of the accused, it is quite as much an official proceeding as the early English preliminary examination before a magistrate, and it has none of the safeguards of a judicial proceeding.[7]

Although Morgan's view was not accepted by all leading experts on the law of evidence, the great majority concurred in his assessment.[8] Indeed, the Justice Department, true to its originalist premises, concedes that the self-incrimination clause applies to the informal pressures of custodial interrogation.[9]

Not only do policy and history suggest the implausibility of restricting the fifth amendment's protection to purely formal pressures, but the principles applied in contexts other than police interrogation make clear that no tenable line can be drawn between formal and informal compulsion. In fact, *Miranda*'s first holding

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[6] Lewis Mayers, The Federal Witness' Privilege Against Self-Incrimination, 4 Amer. J. Legal Hist. 107, 114 n.20 (1960); Kamisar, Police Interrogation at 48-55 (cited in note 5).

[7] Edmund Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27, 28 (1949).

[8] See John T. McNaughton, The Privilege Against Self-Incrimination, in Claude R. Sowle, ed., Police Power and Individual Freedom 223, 237-38 (1962). See also Bernard D. Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 696 (1951), noting the "queer set of doctrines, which bar interrogation in an orderly inquiry but permit it where the danger of physical abuse and unfair pressure is greater." Dean Wigmore insisted, however, that the fifth amendment did not apply to police interrogation. John H. Wigmore, 3 Evidence § 851 (3d ed. 1940).

[9] See DOJ Report at 42 (cited in note 2):

> The applicability of the Fifth Amendment at this stage is in fact consistent with the historical understanding of the Fifth Amendment right. Police interrogation is the functional equivalent in contemporary criminal justice systems of the common law institution of preliminary examinations before justices of the peace, at which the applicability of the right against compelled self-incrimination was recognized.

was strongly foreshadowed by *Griffin v. California*,[10] in which the Court held that prosecutorial comment upon a defendant's failure to testify at trial violated the privilege by making its assertion costly. The compulsion in *Griffin* did not flow from formal process or any legal obligation to speak. The problem was that the prosecutor's comment increased (indirectly) the chances of conviction. To be sure, the trial court lent its approval (indirectly) to that consequence, by declining to bar this kind of jury argument. But what mattered in *Griffin* were the real world consequences of the prosecutorial behavior, not whether the state had brought to bear any formal process or official sanction. If a requirement of formal compulsion remained at all after *Griffin*, it surely had been stretched paper-thin.

Developments subsequent to *Griffin* have confirmed this evolution and made clear that compulsion can no longer be limited to the pressure of formal sanctions. Building on *Griffin*'s holding that the prosecution cannot comment on a defendant's silence at trial, the Court recently held that even in the absence of such comment, the judge must instruct the jury not to draw adverse inferences from silence; in effect, "compulsion" arises from the state's failure to take reasonable steps to eliminate pressure that is wholly informal and psychological.[11] Similarly, in an extension of decisions that bar the state from firing an employee who refuses to waive his fifth amendment privilege, the Court recently reasoned that to assess compulsion, "we must take into account potential economic benefits realistically likely of attainment. Prudent persons weigh heavily such *legally unenforceable prospects* in making decisions; to that extent, removal of those prospects constitutes economic coercion."[12]

Against this background, the pre-*Miranda* claim that the fifth amendment had no application to informal pressure seems an historical curiosity. Although *Miranda*'s rejection of this claim overruled numerous precedents, that step in its analysis no longer seems open to serious question.

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[10] 380 U.S. 609 (1965).

[11] Carter v. Kentucky, 450 U.S. 288 (1981). The Court's opinion was written by Justice Stewart, who had authored the dissent in *Griffin*, and joined by Justice White, the other dissenter in *Griffin*. In *Carter*, Justice Powell concurred in the result and only Justice Rehnquist dissented.

[12] Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977) (Burger) (emphasis added). Justice Rehnquist did not participate in *Cunningham*; only Justice Stevens dissented.

II. Interrogation as Compulsion

Miranda's second major step was the holding that any custodial interrogation involves enough pressure to constitute "compulsion" within the meaning of the fifth amendment. Again, notice that there is no doubt about the legitimacy of settling this issue by judicial decision. The question of what pressures constitute "compulsion" unavoidably confronts the Court in cases involving loss of a job, a comment on silence, or the menacing look of a person in authority. There is nothing improper or even unusual about deciding such questions in the course of adjudication.

On the merits, is the Court's second holding sound? This issue is much more problematic than the first. One difficulty arises from the emphatically per se character of the Court's holding. But before addressing this problem, we must be clear about the standard that would apply, in the absence of a per se rule, to determine when interrogation is "compelling."

A. Confusion About Compulsion

The fifth amendment was no doubt intended to prohibit Star Chamber inquisition tactics such as the rack and the thumbscrew. But brutal torture is not the only method of interrogation that the amendment prohibits. Fifth amendment compulsion perhaps can be identified more naturally with the requirement of voluntariness under the due process clause. Under this approach, a person is "compelled" for fifth amendment purposes when his will is overborne by pressure, whether physical or psychological. This conception of the fifth amendment test appears to be common, and it has been reinforced by loose language in numerous decisions. *Miranda* (and *Bram* before it) treated fifth amendment protection as distinct from the voluntariness requirement, but then drew on voluntariness concepts to explain "compulsion." Other Warren era decisions expanding fifth amendment protection again seemed to conflate the two concepts, even when no reading of the confession cases decided under the voluntariness concept could support the broad notion of "compulsion" that the Court applied.[13] More recently, the Court has made explicit the connection between compulsion and the due process standard. In *Oregon v. Elstad,* for example, the Court said that an actual violation of the fifth amendment (as distinguished from a mere presumption of compul-

[13] The Warren Court decisions include, e.g., Malloy v. Hogan, 378 U.S. 1 (1964); Garrity v. New Jersey, 385 U.S. 493 (1967).

sion) occurs only when there is "physical violence or other deliberate means calculated to *break the suspect's will.*"[14]

If this is what fifth amendment compulsion requires, then *Miranda*'s second step involved a seemingly superfluous change in the wording of the governing test, followed by a glaring non sequitur in the application of that test to the facts. The Court replaced involuntariness (the due process touchstone) with compulsion (an identically defined fifth amendment criterion) but then found compulsion in circumstances that countless decisions had found consistent with voluntariness, circumstances that no stretch of the imagination could view as breaking the suspect's will. Thus, if compulsion is properly equated with the due process prohibition against breaking the will, *Miranda*'s second holding not only departs from precedent but appears unjustified and even incomprehensible in terms of the applicable constitutional standard.

The Justice Department report develops this theme and takes it to its logical conclusion. If a departure from *Miranda*'s requirements does not necessarily violate the Constitution, where does the Court get its authority to reverse the conviction? Taking literally the Court's recent comments that distinguish between *Miranda* violations and constitutional violations, the report argues that *Miranda* itself must be wrong.

The original *Miranda* decision did not proceed on this basis, of course. The majority opinion and the dissents all reflect an understanding that voluntariness and fifth amendment compulsion are distinct concepts. Indeed, the point had been underscored at oral argument:

> Mr. Justice Harlan: Is there a claim that the confession was coerced?
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> Mr. [Victor M.] Earle, [III] [counsel for petitioner in the companion case of *Vignera v. New York*]: *In no sense.* I don't think it was coerced *at all.* Mr. Justice White asked yesterday a question about compelling someone to give up his Fifth Amendment privilege. I think there is a substantial difference between that and coercing a confession. . . . It is true that the word "compel" is used in the Fifth Amendment with respect to the privilege, but it is quite different to say that the privilege is cut down and impaired by detention and to say a man's

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[14] 470 U.S. 298, 312 (1985) (emphasis added). See also New York v. Quarles, 467 U.S. 649, 654 (1984); United States v. Washington, 431 U.S. 181, 188 (1977); Michigan v. Tucker, 417 U.S. 433, 443-46 (1974). For discussion see Geoffrey R. Stone, The *Miranda* Doctrine in the Burger Court, 1977 S. Ct. Rev. 99, 118-20.

will has been so overborne a confession is forced from him.[15]

Despite the concession that Vignera's confession was *not* coerced, the Court reversed Vignera's conviction and stated explicitly that custodial interrogation was "compelling" within the meaning of the self-incrimination clause even when it did not render a statement "involuntary."[16] The Court's recent comments assuming that a fifth amendment violation requires overbearing the will thus appear to disregard (or to overrule without discussion) the core of what *Miranda* decided.

Of course, debate about the meaning of compulsion cannot be settled simply by resort to *stare decisis*. Though *Miranda*'s conclusion, which distinguished involuntariness from compulsion, was clear enough at the time, many have not understood how the Court could support its position. If a compelled statement *means* an involuntary one, indeed if—as able writers suggest—it can mean nothing else,[17] then *Miranda*'s second holding is fragile indeed.

The decisive question is whether fifth amendment compulsion should be equated with the due process rule against the use of "deliberate means to break the suspect's will." It is readily understandable that terms so similar in ordinary usage, "involuntary" and "compelled," can get confused with one another, even by lawyers. Nonetheless, this concept of compulsion involves a fundamental misunderstanding of uncontroversial fifth amendment principles and, if taken seriously, would make nonsense of the privilege against self-incrimination.

Consider, for example, the principle that a threat to discharge a public employee will render any resulting statement "compelled." No one would suggest that the threat "breaks the will" of the employee; he simply faces the unpleasant choice between silence and his job. Similarly, a comment on the defendant's silence at trial is impermissible because it makes exercise of the privilege

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[15] Oral Arguments in *Miranda* and Companion Cases, excerpted in Yale Kamisar, Wayne R. LaFave, and Jerold H. Israel, Modern Criminal Procedure 537, 540 (6th ed. 1986) (emphasis added).

[16] Miranda, 384 U.S. at 457. See Yale Kamisar, The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court, in Herman Schwartz, ed., The Burger Years 143, 152-53 (1987).

[17] See, e.g., Henry J. Friendly, A Postscript on *Miranda*, in Benchmarks 271-72 (1967). Professor Grano writes that "compulsion in the context of police interrogation . . . can be understood only as a synonym for coercion. . . . This, of course, is precisely what the due process voluntariness cases protected against. . . . [I]t cannot be anything more." Joseph D. Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich. L. Rev. 662, 684 (1986).

costly; no one could suggest that the prospect of this disadvantage breaks the defendant's will. One might reconcile compulsion principles with the voluntariness standard by suggesting that language about "breaking the will" should not be taken literally, that due process prohibits even mild pressures that are perceived as unfair. *Miranda*'s critics cannot take this route, however, because mild interrogation pressures could then render a confession "involuntary." And no one trying to make sense of the law can take this route either, because it dilutes the voluntariness concept beyond recognition; a voluminous contemporary case law continues to find extended interrogation compatible with voluntariness in the due process sense.

There is an alternative route for reconciling current doctrine with the assumption that compulsion means involuntariness. Insisting that compulsion means *overbearing* pressure, one could question *Griffin* and the employment discharge cases. Indeed, if "breaking the will" or some similarly stringent test governs, then these decisions are wrong, and the Court must be prepared to overrule them. But apart from the fact that the Court has shown no inclination to do so, this way of thinking about "compulsion" cannot carry us very far. Consider a contempt statute subjecting a defendant to fine or six months' imprisonment for refusal to testify. If the fifth amendment means anything, it means that a witness claiming a potential for self-incrimination cannot be punished under such a statute; modest fines and brief imprisonment constitute compulsion. Even a $100 fine for silence is improper. Yet no one would suggest that such a penalty "breaks the will," and without violating due process we regularly impose more severe sanctions upon recalcitrant witnesses not in a position to claim the privilege.

One may be tempted to say that imposing a direct penalty is especially offensive or unfair. But why? If we have to reinvent the distinction between formal and informal pressure, we are not on very attractive ground. Nor can we find refuge in the principle that bars punishment for the exercise of constitutional rights. If the fifth amendment grants only a right not to be "compelled" and if compulsion means overbearing the will, then the witness has no privilege to keep both his silence and his $100 in the first place.

The upshot is that compulsion for self-incrimination purposes and involuntariness for due process purposes cannot mean the same thing. Much as one would like to resist the proliferation of terms, any attempt to get by with one concept, combining compulsion and involuntariness, creates more problems than it solves.

The need for distinct concepts of "involuntariness" and "compulsion" is confirmed by the law of waiver. When *Miranda*'s critics assume that self-incrimination and due process protections must be the same, they find waiver a mystery. Why would any sane person waive his right to be free of torture, physical abuse, or psychological pressure that breaks the will? Yet countless cases purport to deal with waiver of the fifth amendment privilege, in the interrogation context and elsewhere. Such waivers are not legally inconsequential, but neither do they give a green light for "breaking the will."

At trial, any penalty imposed on a witness for refusal to testify constitutes "compulsion" and is impermissible if there is potential self-incrimination. But once the witness freely chooses to testify, the state can subject the witness to "compulsion." This does not mean that the witness can be tortured, nor can he be subjected to thirty-six hours of continuous cross-examination by teams of attorneys in relay. Under no circumstances, with or without waiver, can the state break the witness's will. What waiver means is that the state can subject the witness to the more civilized but nonetheless "compelling" pressures that are prohibited only by the self-incrimination clause. Cross-examination is permissible (during business hours, with reasonable breaks, and with a defense attorney nearby), trick questions can be used to get at the facts, and if the witness balks, the state can deploy sanctions for the specific purpose of pressuring the witness to tell the truth. After waiver the state can "compel" answers, but it can never do so by overbearing tactics that render the answers "involuntary."

These examples make clear that fifth amendment compulsion cannot be identified with involuntariness and is never limited to breaking the will. At the other extreme, compulsion cannot be satisfied by any inconvenience resulting from failure to testify. Insisting on the latter point, opponents of *Miranda* argue that compulsion is a matter of degree and that the Court necessarily has discretion in determining *how much* pressure to permit. It follows, they suggest, that the line drawn by *Miranda* was no more logical than that drawn by the voluntariness cases and that law enforcement needs can be weighed in striking the constitutional "balance."[18] But this kind of argument assumes that standards for

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[18] Professor Grano's analysis is representative:

> [Z]ero-value pressure simply is impossible. . . . Thus, unless the issue is seen as one of degree, either all statements are coerced or none are. . . . Words like "compel," . . . therefore must draw their meaning from policy considerations, and their meaning ac-

"compulsion" in police interrogation can be independent of the benchmarks used to resolve this issue in other fifth amendment contexts. In self-incrimination analysis, the threshold of permissible pressure is low, and more importantly, the *amount* of pressure is less significant than the reason why pressures arise. Disabilities or pressures that have the effect of discouraging silence but are not created for that reason normally are permissible.[19] But pressure imposed for the *purpose* of discouraging the silence of a criminal suspect constitutes prohibited compulsion whether or not it "breaks the will." This is the clear teaching of the fifth amendment's core applications to compulsion by legal process. The policy served by the amendment is not limited to preventing inhuman degradation or breaking the will, but extends to all governmental efforts intended to pressure an unwilling individual to assist as a witness in his own prosecution.[20]

From this perspective, *Miranda* is not in conflict with the numerous voluntariness cases decided before 1966. *Miranda* overruled the implicit holding of these cases that the fifth amendment

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cordingly should vary in different legal contexts.
Grano, 84 Mich. L. Rev. at 685 n.101 (cited in note 17).

[19] *Griffin* (which barred adverse comment on the defendant's failure to testify at trial) suggests that this generalization may have limits. Although Justice Harlan later attempted to explain *Griffin* as a case "in which the only possible purpose of the practice was thought to be to penalize the accused for his use of the constitutional privilege," Spevack v. Klein, 385 U.S. 511, 529 (1967) (dissent), *Griffin* seems concerned primarily with compelling effects.

In the employment discharge cases, the states have argued that their purpose is not to compel self-incrimination but solely to ensure the integrity of the public service. In Lefkowitz, 431 U.S. at 809, the Court responded to this claim by noting that "[o]nce proper use immunity is granted, the State may use its contempt powers to compel testimony . . . without forfeiting the opportunity to prosecute the witness on the basis of evidence derived from other sources." In other words, since use immunity is available, the state's objective in compelling testimony *without use immunity* can only be seen as one of making the suspect a witness against himself in a prosecution. The same analysis would provide the traditional way to address public safety concerns like those presented in New York v. Quarles, 467 U.S. 649 (1984): fifth amendment principles do not prevent police from "compelling" a suspect to reveal the whereabouts of his gun (or kidnap victim), but those principles do require that resulting evidence not be used against him at trial.

[20] Without violating the fifth amendment, the government may pressure witnesses to provide testimony or other information, and the burden is on the individual who fears self-incrimination to claim the privilege. So long as the claim of privilege is available, the governmental pressure compels answers but does not compel self-incrimination. But the individual's obligation affirmatively to claim the privilege does not apply when governmental inquiries are addressed to those inherently suspect of criminal activities. Garner v. United States, 424 U.S. 648, 652 n.7, 657, 660 (1976). In custodial interrogation, for example, "the inquiring government is acutely aware of the potentially incriminating nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures." Id. at 657.

was inapplicable to *informal* compulsion, but on the question of *which* informal pressures constituted compulsion, these cases were silent. In holding that police had not "broken the will" of various suspects, these cases had not found an absence of state-created pressures to speak. Indeed, it was evident in every one of the voluntariness cases that police had employed significant pressure for the purpose of getting recalcitrant suspects to talk. Under the due process approach, such pressures were permissible if not so extreme as to "shock the conscience." Even express promises of benefit, designed to overcome silence, had been allowed when they did not break the suspect's will.[21]

The one pre-*Miranda* precedent that is relevant to determining the degree of interrogation pressure permissible for fifth amendment purposes is *Bram*. There, in the course of a brief interview the interrogator had suggested, "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."[22] The Court found this statement sufficient by itself to establish a fifth amendment violation. The Court held that the statement "might well have been understood as holding out an encouragement that by [naming an accomplice] he might at least obtain a mitigation of the punishment for the crime. . . . '[T]he law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration *if any degree of influence has been exerted.*' "[23]

It is this standard, never considered controversial when applied to judicial proceedings, that underlies *Miranda*'s second holding. Custodial interrogation brings psychological pressure to bear for the specific purpose of overcoming the suspect's unwillingness to talk, and it is therefore inherently compelling within the meaning of the fifth amendment.

B. The Conclusive Presumption of Compulsion

Even if the *Miranda* decision is supportable so far, difficulty arises from the per se character of the Court's holding. The Court found compulsion in a police officer's very first question. Defenders of *Miranda* would note that even one question can be compelling

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[21] Stein v. New York, 346 U.S. 156 (1953). This remains the rule today in cases in which only the due process test applies. Miller v. Fenton, 796 F.2d 598, 608 (3d Cir. 1986).

[22] Bram, 168 U.S. at 539.

[23] Id. at 565 (emphasis added), quoting William O. Russell, Treatise on Crimes and Misdemeanors 479 (6th ed. 1896).

under some circumstances. The response of a naive young suspect, following just a few seconds of interrogation, can plausibly be seen as compelled by fear of mistreatment, by expectations of unrelenting interrogation, or more simply by the utterly natural assumption that he is obliged to answer—that when a person in authority asks a question, the official is legally entitled to a response.

But an argument of this kind cannot support *Miranda*'s crucial second step. The Court did not hold that a brief period of interrogation *can* involve compulsion. The Court held that the briefest period of interrogation necessarily *will* involve compulsion. To test this conclusion, we must consider whether a defendant's first answer always will be compelled.

In thinking realistically about this issue, one must recognize that even the sophisticated, knowledgeable suspect faces considerable state-created pressure to talk. The sophisticated suspect, precisely because he knows the law, will be aware that under the due process approach, the police can subject him to extended periods of interrogation, day and night. He will also know that if he does not talk, his silence can count against him. In fact, even after *Miranda,* it remains true that post-arrest silence can be used for impeachment purposes if the detained suspect has not received warnings.[24] A sophisticated suspect would know that refusal to respond to questions would subject him to a penalty in the event of trial, and pre-*Miranda* interrogators were trained to get this point across to any suspect sufficiently knowledgeable to attempt to invoke his rights.[25]

Beyond these problems lies a more basic difficulty. Even if our sophisticated suspect knows his rights and their ramifications, he needs to know whether the *police* know his rights. And he needs to know whether the police are prepared to *respect* those rights. If our sophisticated suspect knows anything about the law in action, he will know that custodial interrogation occurs outside the view of any disinterested observer. He will know that for perfectly understandable reasons, conscientious officers, intent on solving brutal crimes, sometimes lose their tempers and that instances of physical abuse, though not the norm, often surface in case reports and in

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[24] Fletcher v. Weir, 455 U.S. 603 (1982).

[25] Prior to *Miranda*, a well-known manual for police interrogators advised the following response to the suspect who invoked his right to silence: "Joe, you have the right to remain silent. That's your privilege. . . . But let me ask you this. Suppose you were in my shoes and I were in yours . . . and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide." Fred E. Inbau and John E. Reid, Criminal Interrogation and Confessions 111 (1962).

the newspapers.[26] Even the sophisticated law professor or professional investigator, if he found himself suspected of crime, would be under considerable pressure to cooperate with the police, to try to get them on his side by telling what he knew or what he thought he could safely disclose, rather than standing confidently on his right to remain silent. So it is by no means implausible for the Court to have said that any custodial questioning, even for a few seconds, is inherently compelling.

One might argue, however, that my examples do not go far enough, because they still depend on introducing elements of fear and anxiety. What justification is there for holding that such elements necessarily *must* be present in every custodial interrogation? Surely one can imagine a case in which a law professor-suspect knows his rights and is not in fear of abuses, in which he tells all in response to the first question, not because of any sense of pressure but simply because he wants the truth to come out. Because such a case is conceivable, and because the Court's per se rule would find a fifth amendment violation even in that case, some critics conclude that *Miranda*'s second holding is itself prophylactic, that the Court did not simply *interpret* the meaning of compulsion but rather replaced the no-compulsion rule with a much broader prohibition. Professor Joseph Grano develops this view in a particularly forceful article.[27]

In evaluating this challenge to the use of conclusive presumptions and related forms of prophylactic rules, we must remember first that these aids to adjudication are a pervasive feature of judicial decision making. In antitrust law, the courts conclusively presume that certain kinds of agreements constitute unreasonable restraints of trade.[28] In constitutional law, prophylactic rules conclusively presume abridgement of freedom of speech from the

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[26] Examples continued to surface in the 1970s and 1980s. See, e.g., the series, The Confession Takers, Newsday (Dec. 7-19, 1986), and the reported decisions collected in Welsh S. White, Defending *Miranda*: A Reply to Professor Caplan, 39 Vand. L. Rev. 1, 13-14 & n.73 (1986). The cases collected by White included such tactics as choking the suspect, twisting an arm behind his back, and threatening him with death (Florida 1982); striking the suspect's pregnant wife in the stomach and preventing her from receiving medical attention until the suspect confessed (Louisiana 1984); twenty-six hours of continuous interrogation (Connecticut 1973); interrogating the suspect while he was naked and encouraging him to consume large quantities of alcohol (Maine 1983); threatening to imprison the suspect's wife and place his children in foster care (West Virginia 1981).

[27] Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. L. Rev. 100 (1985).

[28] See, e.g., U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (per se rule against price fixing).

mere *possibility* that certain kinds of statutes will deter the exercise of first amendment rights.[29] The required separation of church and state is violated in some contexts by the mere *risk* that state-sponsored programs can be used for religious indoctrination, even when undisputed evidence makes clear that the risk has not materialized.[30] The Court has held, in a ruling rarely if ever questioned by critics of *Miranda*, that an indigent's need for appointed counsel in a felony prosecution will be conclusively presumed, regardless of evidence about his maturity, background, and education.[31] Similarly, under the voluntariness test preferred by critics of *Miranda*, the Court held as early as 1944 that a few extreme forms of police pressure would trigger a conclusive presumption of involuntariness, regardless of evidence of the suspect's maturity, stamina, or physical condition.[32]

In recent years the Supreme Court has tended to prefer constitutional tests that turn on all the circumstances. But the Court has not only reaffirmed the kinds of prophylactic rules just mentioned, but also, in response to its own perceptions of the problems of adjudication, the Court has created new presumptions that amount to reverse prophylactic rules. The Court has ruled, for example, that a police officer's search of the rear seat of a car, incident to the arrest of an occupant, will be conclusively presumed reasonable, regardless of evidence that the particular suspect may have been handcuffed or far removed from the car, and regardless of evidence about whether any other legitimate basis to search was actually present.[33]

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[29] See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972).

[30] See Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985). See generally Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) It is clear that the *Lemon* rule is purely prophylactic. The Court has not held that any risk of religious indoctrination violates the first amendment; rather, the Court has held that that harm will be presumed in the context of a high school program, but must be proved in the context of a comparable college program. See, e.g., Tilton v. Richardson, 403 U.S. 672, 684-89 (1971) (plurality opinion) (distinguishing college involved in case from lower schools involved in *Lemon*).

[31] Gideon v. Wainwright, 372 U.S. 335 (1963). Professor Grano argues that the *Gideon* rule rests not on a conclusive presumption but rather on the view that the sixth amendment itself requires counsel even in the absence of actual prejudice. Grano, 80 Nw. L. Rev. at 116-19 (cited in note 27). This subtle distinction seems difficult to maintain in the face of such cases as Scott v. Illinois, 440 U.S. 367 (1979) (sixth amendment does not require counsel where there is no penalty of imprisonment) and Strickland v. Washington, 466 U.S. 668 (1984) (for a violation of sixth amendment right to counsel, defendant must show that counsel's performance prejudiced the defense so as to deprive defendant of fair trial).

[32] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[33] New York v. Belton, 453 U.S. 454 (1981). Not all "bright line" decisions are necessarily prophylactic. For example, United States v. Robinson, 414 U.S. 218 (1973), can be

Neither the pervasiveness of prophylactic rules nor their proliferation under both "liberal" and "conservative" Courts necessarily proves that such rules are legitimate. But one can see that the Court would face enormous adjudicatory burdens if resort to conclusive presumptions was never permissible. *Ashcraft v. Tennessee*[34] makes clear the dilemma. In that case the Court ruled that thirty-six hours of continuous interrogation was "inherently coercive." Writing for the three dissenters, Justice Jackson passionately protested the Court's refusal to consider all the circumstances and its reliance upon an "irrebuttable presumption."[35] The goal, Jackson implied, should not be rulemaking but only the most accurate resolution of the case *sub judice*.

All agree that a court's responsibility for accurate factfinding allows it to assign burdens of proof and to adopt rebuttable presumptions. Professor Grano, echoing Justice Jackson, argues that a conclusive presumption is qualitatively different.[36] But in appropriate circumstances, the same logic applies to both kinds of presumptions. When an assessment is complex and often beyond the ken of judges (as in the antitrust area) or when proof of the circumstances crucial to a fact-bound judgment is largely within the control of one party (as in *Ashcraft*), a conclusive presumption may be the best way, over the run of cases, to minimize adjudicatory error. Consider the alternative. Should police be allowed to give the prisoner a few punches or kicks, so long as the force used does not (under all the circumstances) overbear his will? One slap would intimidate most of us, but what about the professional gangster or the hardened contract killer? In the heyday of the "totality" test, the Court insisted upon weighing all the circumstances in such cases, and it once held voluntary a confession obtained after

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read as resting on the proposition that it is *always* reasonable to conduct an immediate search of an arrestee, without pausing to make judgments about the need to do so under the circumstances. But *Belton* cannot be saved in this fashion. The Court there rested its decision squarely on the logic of conclusive presumptions:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, *even if not inevitably*, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]" [quoting Chimel v. California, 395 U.S. 752, 763 (1969)]. In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the areas that may be searched in light of that generalization.

453 U.S. at 460 (emphasis added).

[34] 322 U.S. 143 (1944).

[35] Id. at 158.

[36] Grano, 80 Nw. L. Rev. at 145 (cited in note 27).

police had kicked the suspect in the shins.[37] But in subsequent cases all the justices, including Jackson, agreed that even the voluntariness test had to include prophylactic rules: a single blow would render a confession involuntary per se.[38] Of course, one must look closely at prophylactic rules to see whether they are appropriate for the context in which the Court has applied them. But there is nothing inherently improper or illegitimate about a rule just because it embodies a conclusive presumption.

Against this background, we can return to *Miranda*'s holding that *any* custodial interrogation is inherently compelling. The proper question is whether an irrebuttable presumption is an appropriate adjudicatory tool in this particular context. This is a question with a history, and the *Miranda* Court came to it after decades of experience with case-by-case assessment of all the circumstances. Whatever logic may have suggested about the rigidity of conclusive presumptions, experience had shown that the flexible due process test created numerous problems, not only for suspects facing interrogation, but also for the courts and for the police.[39] Although the shift from due process to the fifth amendment approach reduced the permissible degree of pressure and ostensibly eliminated the basis for "balancing" the need for a confession against the suspect's right to silence, other difficulties of the due process approach remained. The flexible test had left lower courts without usable standards and thus had created disproportionate demands for case-by-case review in the federal courts. The problems of judicial review also meant that intense interrogation pressures were inadequately controlled in practice. The case-by-case approach even failed to prevent, and in subtle ways actually encouraged, outright physical brutality. As Dean Wigmore noted, "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture."[40] Finally, case-by-case review left police themselves without adequate guidance. Faced with a reti-

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[37] Stroble v. California, 343 U.S. 181 (1952).

[38] Stein v. New York, 346 U.S. 156, 182 (1953) (Jackson). See also Fikes v. Alabama, 352 U.S. 191, 198 (1957) (Frankfurter and Brennan, concurring); Monrad G. Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 417-21, 428 (1954); Kamisar, Police Interrogation at 22-23 (cited in note 5).

[39] For discussion, see Stephen J. Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 867-78 (1981) (book review); Kamisar, Police Interrogation at 1-25, 69-76 (cited in note 5).

[40] Wigmore, 8 Evidence at 309 (cited in note 8).

cent suspect who might be starting to "crack," were the police supposed to give him some rest or to keep up the pressure? The due process approach in effect told police to do both.

To put these problems in perspective, we must consider how often, after meticulous evaluation of the circumstances, a genuine absence of compulsion can be found. Police interviews are tension-filled matters under the best of circumstances. Interviews in the absence of counsel, in the police-dominated custodial environment, are filled with tension in spades. And the tensions are created for the very purpose of overcoming the suspect's unwillingness to talk. Professor Grano himself recognizes as much:

> [D]istinctions can be made in terms of perceived offensiveness among tactics designed to increase the suspect's anxiety. The point remains, however, that *all such tactics, whether or not "offensive," are intended to increase the pressure—the compulsion—on the suspect to confess.* The "inherent compulsion" of custodial interrogation would be present if an untrained, uniformed officer questioned the suspect in the stationhouse receiving room.[41]

The Justice Department report, in referring to *Miranda*'s holding that interrogation is inherently compelling, repeatedly characterizes this conclusion as a "fiction." One must wonder which view is further from reality. Justice Jackson, an ardent proponent of extended interrogation, saw the point clearly: "To speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional."[42] Professor Gerald Caplan, a prominent contemporary critic of *Miranda*, concedes that "[i]n ordinary discourse, voluntariness suggests free will, choice, even spontaneity. In the typical interrogation, however, there is some coercion; the suspect is detained, queried, challenged, and contradicted."[43] The Justice Department's notion that an isolated, unwarned suspect facing custodial interrogation is not typically under great state-created pressure to talk is itself the flimsiest of fictions.

Is it clear that such pressure is sufficient to cross the constitutional threshold of compulsion? Once again, *Griffin v. California* is suggestive. Justice Stewart, dissenting in *Griffin*, complained that the Court had "stretche[d] the concept of compulsion beyond all

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[41] Grano, 84 Mich. L. Rev. at 674 (cited in note 17) (emphasis added).

[42] Ashcraft, 322 U.S. at 161 (dissenting opinion).

[43] Gerald M. Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1430 (1985).

reasonable bounds."[44] A few critical commentators agree. But *Griffin*, decided over only two dissents, remains good law and has been reaffirmed and extended by lopsided majorities in the Burger Court.[45] If a comment on silence generates impermissible pressure to speak at trial (where the comment adds only marginally to inferences the jury will draw anyway), can we say that a police officer's request for information, addressed to an unwarned suspect in custody, does not create impermissible pressure? Because an adverse inference from silence is also a prospect when the suspect refuses the officer's request, a finding of compulsion here follows *a fortiori* as long as *Griffin* remains on the books.

Under these circumstances, is it any wonder that the Court, exasperated after years of case-by-case adjudication, finally adopted a prophylactic rule? A conclusive presumption of compulsion is in fact a responsible reaction to the problems of the voluntariness test, to the rarity of cases in which compelling pressures are truly absent, and to the adjudicatory costs of case-by-case decisions in this area. Indeed, in any ranking of the issues that properly demand some form of prophylactic rule, the problem of determining compulsion in the context of custodial interrogation wins the prize hands down.

To summarize, then, one has to say that *Miranda*'s second step, like its first, not only was an unquestionably legitimate act of adjudication, but also was, on the merits, a sound and entirely justified interpretation of the fifth amendment. Indeed, the Court *cannot* overrule *Miranda*'s first or second holdings without tearing a wide hole in the fabric of fifth amendment doctrine and dismantling the foundations of numerous uncontroversial precedents outside the area of police interrogation.

III. The Warnings

This brings us to *Miranda*'s third step, its well-known panoply of "code-like rules,"[46] requiring that the suspect receive a complex, four-part warning of his rights. Here the complaints about judicial legislation seem at first glance to have some substance. But in weighing the force of those complaints, we should focus carefully on the *effect* of *Miranda*'s detailed rules. Do the warnings "hand-

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[44] 380 U.S. at 620.

[45] See, e.g., Brooks v. Tennessee, 406 U.S. 605 (1972); Carter v. Kentucky, 450 U.S. 288 (1981); James v. Kentucky, 466 U.S. 341 (1984).

[46] Edwin Meese III, Square *Miranda* Rights With Reason, Wall St. J. 22 (June 13, 1986).

cuff" the police? We can now see that their function is precisely the opposite. If the Court was correct in the first two steps of its analysis, and I submit that it was, then far from handcuffing the police, the warnings work to *liberate* the police. *Miranda*'s much-maligned rules permit the officer to continue questioning his isolated suspect, the very process that the Court's first two holdings found to be a violation of the fifth amendment.

The Court's theory with respect to the warnings was that they could "dispel" the inherently compelling atmosphere of police interrogation. But there is great room for doubt about that theory. Indeed, the *Miranda* opinion itself suggests that such a theory is not especially realistic:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. . . . A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to [assure an unfettered choice between silence and speech] among those who most require knowledge of their rights. . . . Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process.[47]

The notion that police-initiated warnings can "dispel" the compulsion thus seems dubious at best. But whether or not they went far enough, *Miranda*'s warnings unquestionably serve—and from the outset were designed to serve—the function of permitting custodial interrogation to continue. Indeed, the Court would have incurred far more police criticism if it had remained within a narrow conception of the judicial role, pronounced interrogation "inherently compelling," and then left law enforcement officials to guess about what countermeasures would keep police on the safe side of the constitutional line. As Justice Rehnquist recognized, writing for the Court in *Michigan v. Tucker,* the purpose of the warnings is "to *help* police officers conduct interrogations without facing a continued risk that valuable evidence [will] be lost."[48]

Why do *Miranda*'s critics make such a fuss about the warnings? If the suspect already knows his rights, it hardly can hamper law enforcement for police to reiterate them. At the heart of the problem is the suspect who does not know his rights, who believes that the police are entitled to make him talk. But since such a

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[47] 384 U.S. at 469-70.

[48] 417 U.S. 433, 443 (1974) (emphasis added).

suspect thinks he is *obliged* to respond, his answers are "compelled" in violation of the fifth amendment privilege.

The crux of the matter is that the Justice Department wants to use statements compelled by the suspect's belief that he is obliged to answer. But this objective contains the seeds of a dilemma. The Department's report asserts that statements can be induced by a mistaken sense of legal obligation without being "compelled."[49] However, sensing that this is analytical double-talk, the report also recognizes that the absence of warnings will undermine the government's posture in litigation. So the report proposes an alternative: a substitute warning would state that the suspect need not make a statement, but that his refusal to do so could be used against him in court.[50]

Will suspects who have difficulty grasping *Miranda*'s relatively straightforward warnings understand this convoluted message? Even sophisticated lawyers will need more time than a suspect has to decide whether or not this warning recognizes a right to silence. In either event, a warning like this, far from dispelling the interrogation pressures, can only increase them. That is, of course, precisely what the Justice Department wants to accomplish. But it is also precisely what the fifth amendment prohibits.

IV. Damage to Law Enforcement?

The impetus for legitimating greater interrogation pressure is presumably not mainly a desire for logically pure doctrinal analysis. Rather, the primary concern is that *Miranda*'s ground rules reduce police effectiveness in solving crime and producing convictions. But the Justice Department's claims about "damage to law

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[49] See DOJ Report at 104 (cited in note 2):

> While a suspect might believe that he is under a legal obligation to respond to incriminating questions if not told otherwise, it is not apparent why the government should go out of its way to disabuse him of that notion. A failure to do so does not constitute compulsion under the Fifth Amendment.

This argument, not very appealing on its face, is analytically untenable after Carter v. Kentucky, 450 U.S. 288 (1981). See note 11 and accompanying text above.

[50] The proposed warning would read:

> You are not required to make a statement or to answer questions. However, this interview does give you an opportunity to provide any information that would show your innocence or explain your actions. If you choose to remain silent, that fact may be disclosed in court and may cast doubt on any story or explanation you give later on.

DOJ Report at 106 (cited in note 2). Although the warning as written appears to contemplate use of silence only for impeachment, the Justice Department also argues—in direct contravention of *Griffin*—that refusal to talk to the police should constitute evidence of guilt admissible in the government's case in chief. DOJ Report at 113-14.

enforcement" prove surprisingly hollow.

Within weeks after *Miranda* was decided, reports indicated that in many localities the flow of confessions continued unabated.[51] Elsewhere declining confession rates were noted at first, but within a year or two, both clearance and conviction rates were thought to be returning to pre-*Miranda* levels. Study after study confirmed this trend.[52] By the early 1970s, well before the Supreme Court began trimming *Miranda,* the view that *Miranda* posed no barrier to effective law enforcement had become widely accepted, not only by academics but also by such prominent law enforcement officials as Los Angeles District Attorney Evelle Younger and Kansas City police chief (later FBI Director) Clarence Kelly.[53] Justice Tom Clark, who filed an impassioned dissent in *Miranda,* later confessed "error" in his "appraisal of [its] effects upon the successful detection and prosecution of crime."[54] Chief Justice Burger, commenting on his unwillingness to overrule *Miranda,* confirmed this assessment when he wrote that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures."[55]

That *Miranda* has not produced dramatic effects on law enforcement may be attributable to several causes. The result may be due in part to the willingness of some police officers to disregard the *Miranda* requirements (in letter or spirit) and then to lie in court about their performance. *Miranda* itself contained virtually no safeguards against this sort of "adjustment" to the new rules. But many studies have shown that the degree of compliance with *Miranda*'s requirements—especially in large, professionalized police departments—has been high.[56] Nonetheless, suspects agree to

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[51] Kamisar, Police Interrogation at 47-49 & n.11 (cited in note 5).

[52] For helpful summaries of these studies, see Liva Baker, *Miranda*: Crime, Law and Politics 180-81, 403-05 (1983); Otis H. Stephens, The Supreme Court and Confessions of Guilt 165-200 (1973).

[53] See Evelle J. Younger, Interrogation of Criminal Defendants—Some Views on *Miranda v. Arizona*, 35 Fordham L. Rev. 255 (1966); Wayne E. Green, Police vs. Miranda: Has the Supreme Court Really Hampered Law Enforcement, Wall St. J. 16 (Dec. 15, 1966). Publication of the DOJ report triggered a spate of new articles confirming support for *Miranda* in the law enforcement community. See, e.g., Eduardo Paz-Martinez, Police Chiefs Defend Miranda Against Meese Threats, Boston Globe 25, 29 (Feb. 5, 1987); Tom Gibbons and Jim Casey, Ed Meese's War on Miranda Draws Scant Support, Chicago Sun-Times 41 (Feb. 17, 1987).

[54] Tom C. Clark, Observations: Criminal Justice in America, 46 Tex. L. Rev. 742, 745 (1968).

[55] Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (concurring).

[56] See, e.g., Neal A. Milner, The Court and Local Law Enforcement: The Impact of Miranda 208-20 (1971); Stephens, The Supreme Court at 185-88, 199-200 (cited in note 52).

talk without the need for pressure or deception (often because they think they can talk their way out of trouble), and convictions are still obtained without confessions.

What evidence does the Justice Department offer to counter this pervasive perception? The report's discussion of "damage to law enforcement" makes virtually no mention of extensive evidence to the contrary and relies instead on four empirical studies and four specific cases. Three of the empirical studies were conducted by the district attorneys of Manhattan, Brooklyn, and Philadelphia during the weeks immediately following *Miranda,* and they purport to show sharp drops in the confession rate. But all three studies are severely flawed. The data for pre-*Miranda* and post-*Miranda* periods were not compiled by comparable methods, and these studies offer only crude guesses about the extent to which declining numbers of confessions (or "statements") affected clearance and conviction rates. In any event, these twenty-year-old studies are, at most, irrelevant for assessing *Miranda*'s current impact because they record its initial effects, before police had an opportunity to adjust interviewing methods and investigative practices to *Miranda*'s requirements.

Confirmation of this limitation comes directly from one of the Justice Department's own sources. Its Philadelphia data were compiled by then-District Attorney Arlen Specter, who relied on them to decry *Miranda*'s impact in testimony before a congressional committee in 1966. But when Specter, now a Republican Senator, was asked to comment on the DOJ report, he responded that "whatever the preliminary indications were 20 years ago, I am now satisfied that law enforcement has become accommodated to *Miranda,* and therefore I see no reason to turn the clock back."[57]

The DOJ's fourth empirical source, a Pittsburgh study, also focuses on the period immediately following *Miranda,* but it is somewhat more useful than the Brooklyn, Manhattan, and Philadelphia studies because its definitions and sampling methodologies were consistent for the pre-*Miranda* and post-*Miranda* periods. The DOJ report notes that the Pittsburgh study found a 34 percent decline in the confession rate. The report neglects to mention, however, that the Pittsburgh study found no significant change in the clearance or conviction rates.[58] Professor Richard Seeburger,

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[57] Yale Kamisar, Landmark Ruling's Had No Detrimental Effect, Boston Globe A27 (Feb. 1, 1987).

[58] See Richard H. Seeburger and R. Stanton Wettick, Jr., *Miranda* in Pittsburgh—A Statistical Study, 29 U. Pitt. L. Rev. 1, 19, 21, 23-24 (1967).

co-author of the Pittsburgh study, emphatically denies that it provides support for the Justice Department's claim of damage to law enforcement.[59]

The weakness of the Justice Department's empirical claims is paralleled by the surprisingly unpersuasive character of its specific case examples. Four cases—from New York, Texas, California, and Arizona—were selected to document and dramatize *Miranda*'s negative impact. The New York case deals with a pre-*Miranda* confession excluded from a post-*Miranda* trial. This purely transitional problem is at best irrelevant to claims that *Miranda* currently has a damaging impact. In fact the real lesson of the New York case centers on the dangers of destabilizing changes in the law, a lesson that argues for preserving *Miranda,* not for replacing it with a vague voluntariness requirement.

The DOJ's Texas and California examples both involve expansive lower court decisions that threw out murder confessions on grounds *not* required by *Miranda.*[60] What message are these exam-

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[59] See Kamisar, Boston Globe at A27 (cited in note 57). The steady rate of convictions in the post-*Miranda* period does not by itself prove that *Miranda* caused no damage to law enforcement. The data might be the result, for example, of police decisions not to file charges in cases lacking a confession or by prosecutorial decisions to offer more lenient plea agreements to offset evidentiary weaknesses in cases lacking confessions. But the most likely explanation is that police investigated more carefully after *Miranda* and developed other sources of evidence. In fact, Pittsburgh's chief of police told Professor Seeburger that he "welcomed *Miranda* because it provided an opportunity to professionalize the police. . . . [My] officers are doing better work as a result of *Miranda.*" See Yale Kamisar, Overturning *Miranda*: Idea Whose Time Has Come and Gone, [Detroit] Legal Advertiser 1, 4 (Feb. 26, 1987).

[60] In the California case, People v. Braeseke, 25 Cal.3d 691, 159 Cal.Rptr. 684, 602 P.2d 384 (1979), the suspect asked for counsel but later initiated conversation by asking to speak to a police officer "off the record." In the course of that conversation the suspect then agreed to give a tape-recorded statement. Although the California Supreme Court held that *Miranda* required finding the absence of a knowing and intelligent waiver, that holding appears erroneous. See, e.g., North Carolina v. Butler, 441 U.S. 369 (1979). Nor was suppression required by the initial request for counsel, since the suspect initiated further conversation with the police about the subject of the crime. See Oregon v. Bradshaw, 462 U.S. 1039 (1983).

In the Texas case, which is unreported, a suspect named Gaspard received proper warnings, waived his rights, and gave a full confession. According to the DOJ summary of the case, the confession was thrown out "on the ground that he had routinely been assigned counsel on his initial entry into jail [a]lthough Gaspard had never met with his attorney." DOJ Report at A-4 (cited in note 2). Suppression solely on this ground, however, would be error under Moran v. Burbine, 106 S.Ct. 1135 (1986). Several details omitted from the DOJ summary help explain the judge's decision (which was not appealed). The missing details also shed light on the otherwise cryptic and unconventional procedure of "routinely" assigning counsel upon "initial entry into jail." Gaspard was arrested and ordered held on murder charges on January 10, 1984. Counsel was appointed on January 20, and the questioning that produced the confession occurred on January 23. See Mark Sennott, Murder

ples intended to convey? If the concern is that *Miranda* is peculiarly susceptible to unpredictable misapplications, this concern is not spelled out, much less documented, and any such claim would run counter to the widely held perception that as legal rules go, *Miranda* is relatively clear. Indeed the Texas and California examples, like the example of the transition problem, suggest a moral exactly the opposite from the one that the Justice Department seeks to draw: a return to the voluntariness test only would aggravate the problems that these examples illustrate.

The last of the four cases, *Edwards v. Arizona,*[61] is the most surprising entry on the Justice Department's list. *Edwards* did involve a *Miranda* violation, and it did lead to reversal of a conviction for a grisly murder. But the police error in *Edwards* was egregious. The defendant, after invoking his right to counsel, was returned to his cell. Detectives later sought to interview him without counsel; when the defendant refused, a guard told him that he "had to" and led him unwillingly to the interview room. The Court's opinion reversing the conviction was written by Justice White, the Court's most long-standing critic of *Miranda.* Concurring opinions were authored by Chief Justice Burger and by Justice Powell, who was joined by Justice Rehnquist.

The Justice Department's invocation of *Edwards* pointedly raises the problem of determining what protections (if any) the Department would put in *Miranda*'s place. If the Justice Department agrees that the *Edwards* confession would be excluded even without *Miranda,* the case tells us nothing about the impact of *Miranda* itself. If the Department does not agree, its position is unlikely to find favor with the Rehnquist Court.

There is another surprising weakness in the report's reliance on *Edwards.* Reading the DOJ report, one would infer that the Court had turned loose a brutal murderer; indeed the report makes no mention of proceedings on remand. But there was a retrial, Edwards' confession was excluded, and again he was convicted of armed robbery, armed burglary, and murder. Edwards was sentenced to life imprisonment for the murder and to concurrent

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Suspect Goes Free on Technicality, Fort Worth Star-Telegram 1, 14A (Sept. 19, 1985). Moreover, the lawyer was appointed because Gaspard had requested counsel at his arraignment. Telephone interview with William D. Wuester, attorney for Gaspard (Feb. 25, 1987). Under these circumstances, it is arguable that a request for waiver directed to the suspect (now an accused) without notice to or consent from his attorney violated the *sixth* amendment. See Brewer v. Williams, 430 U.S. 387 (1977). If so, the suppression of Gaspard's confession was correct, but on grounds independent of *Miranda.*

[61] 451 U.S. 477 (1981).

twelve to thirty-five-year terms for the other two crimes.[62] Even if *Miranda* itself was the problem in *Edwards, Miranda* itself simply made no difference.

In sum, the Justice Department's evidence of negative law enforcement impact, though heavily stressed in its report, proves on inspection to be extraordinarily weak. The failure to turn up evidence of at least some negative impact provides a striking demonstration of the paucity of such evidence and in effect strongly reinforces the prevailing wisdom that *Miranda* has not posed a significant barrier to effective police work.

There is an irony in these indications that *Miranda* has not impaired law enforcement. If *Miranda* has had little impact, why do civil libertarians get so upset about talk of overruling it? The answer is that procedure matters. The fifth amendment does not protect individuals from conviction, but from a certain method of conviction, and the differences in method are important. When the Supreme Court ruled out physical abuse of suspects, the confession rate may have slackened temporarily, but police soon found other ways to get suspects to talk. When the Supreme Court ruled out psychological intimidation, the same process occurred. Now that police must follow *Miranda*'s principles, they have found that they can get statements without using compelling pressures or get convictions without using confessions at all. For those concerned only with the "bottom line," *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedural guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.

V. *Miranda* as a Compromise

The *Miranda* decision, of course, was a compromise. It did not eliminate all possibilities for abusive interrogation, and it stopped far short of barring all pressured or ill-considered waivers of fifth amendment rights. It did nothing at all about police dominance of the inevitable swearing contest over actual events in the interrogation room. Nevertheless, as things have turned out, *Miranda* did accomplish something, and it did so at surprisingly little cost. *Miranda* reaffirms our constitutional commitment to limited gov-

[62] State v. Edwards, 136 Ariz. 177, 180, 665 P.2d 59, 62 (1983). The Arizona Supreme Court reversed the subsequent conviction on the ground that hearsay evidence had been improperly admitted at the retrial. Id. On remand, on the day the new trial was to begin, Edwards agreed to plead guilty in return for a fifteen-year sentence. Telephone interview with Michael J. Meehan, attorney for Edwards (Feb. 18, 1987).

ernment; it provides a measure of reassurance to arrested suspects who may fear abuse; and by reducing the permissible level of interrogation pressure, it gives suspects questioned in the stationhouse at least some of the safeguards that we extend to suspects questioned in formal, public proceedings.

Whether *Miranda* represents the best possible compromise is a different and more difficult question. Those who do not like *Miranda*'s code-like rules and would strip them from the opinion will be left with the much more stringent principle that the isolated suspect in custody cannot be questioned at all. Those who would replace the *Miranda* code with a different set of procedures must be prepared to justify them not on the basis of law enforcement needs but on the basis of the written constitutional mandate. That inevitably will mean more rather than less protection for the suspect.

Conclusion

For those who would remain faithful to the Constitution, the important question is not, "Which compromise?" Rather, it is the question why compromise is justified at all. Undoubtedly there are times when the self-incrimination clause is hard to live with. (The past five months, with our government hamstrung by the fifth amendment rights of Colonel North and Admiral Poindexter, have certainly been among these.) But the framers surely understood that the fifth amendment would make law enforcement more difficult. Unless one grants the Court a power to keep the Constitution in tune with the times (in this case our crime-ridden and crime-conscious times), claims about damage to law enforcement are irrelevant to the constitutional question. So even if the *Miranda* rules pose serious problems (and they do not), the Court cannot simply give the green light to police use of compelling pressure. The Court cannot amend the fifth amendment and should not be asked to do so. From that perspective, the proper critique of *Miranda* is not that it "handcuffs" the police but that it does not go quite far enough. *Miranda*'s safeguards deserve to be strengthened, not overruled.